

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY 2013 GRAND JURY
MAY 12, 2015 SESSION

FILED

MAY 12 2015

TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 2:14-cr-00264

DENNIS P. FARRELL
GARY SOUTHERN

33 U.S.C. § 1319(c)(1)(A)
33 U.S.C. §§ 1311, 1318
33 U.S.C. §§ 407, 411
18 U.S.C. §§ 157(3), 2(b)
18 U.S.C. § 152(2)
18 U.S.C. § 1343
18 U.S.C. § 1341

S E C O N D
S U P E R S E D I N G
I N D I C T M E N T

The Grand Jury charges:

COUNT ONE
(Negligent Discharge of a Pollutant)

BACKGROUND

At all times relevant to this Superseding Indictment, unless otherwise specified:

Freedom Industries and the Defendants

1. Freedom Industries, Inc. ("Freedom") was a West Virginia corporation located in Charleston, West Virginia, and engaged, directly and through two closely-affiliated companies, in the business of storing, selling, and transporting chemicals

that were used in various industries, including the coal-mining industry. The two affiliated entities were Etowah River Terminal, LLC ("Etowah River LLC") and Poca Blending, LLC ("Poca Blending"). Freedom owned Poca Blending, which operated a chemical storage and processing plant in Nitro, West Virginia (the "Poca Facility").

2. Until December 6, 2013, Freedom was owned by defendant DENNIS P. FARRELL and two other people whose identities are known to the Grand Jury. On December 6, 2013, they sold their shares of Freedom to a Pennsylvania corporation, Chemstream Holdings, Inc. ("Chemstream").

3. From a date no later than October 2001 through approximately December 6, 2013, FARRELL served as the president of Freedom and as a member of Freedom's board of directors.

4. In 2001, FARRELL and the two other owners of Freedom formed Etowah River LLC, which purchased and operated an above-ground storage-tank facility located at 1015 Barlow Drive, Charleston, West Virginia (the "Etowah Facility"), on the east bank of the Elk River. FARRELL and the two other owners of Freedom were the "members" of Etowah River LLC until December 6, 2013, when they sold their interests, that is, their membership units, to Chemstream. Chemstream paid approximately \$20 million for Freedom and Etowah River LLC.

5. After December 6, 2013, FARRELL continued to work at the Etowah Facility in a management role and described himself occasionally as Freedom's president.

6. On December 31, 2013, Etowah River LLC formally merged into Freedom. Prior to that date, and at all relevant times, Etowah River LLC acted on behalf of and with the intent to benefit Freedom. Among other things, Freedom and Etowah River LLC shared common owners/members, as well as accountants and finance, administrative, and other personnel. Moreover, the plant manager and tank operators at the Etowah Facility reported to Freedom's Chief Operating Officer and owners. (Hereinafter, all references to Freedom will include Etowah River LLC.)

7. In or about May 2009, defendant GARY SOUTHERN began serving as Freedom's Chief Operating Officer. From March 17, 2010, through October 10, 2013, SOUTHERN also served on Freedom's board of directors. SOUTHERN became Freedom's president in late December 2013, after Chemstream purchased Freedom.

8. In their respective capacities as officers, directors, managers, and supervisors of Freedom, defendants FARRELL and SOUTHERN were "responsible corporate officers" of Freedom. That is, they had the responsibility for, and the authority over, the operations and management of Freedom and the Etowah

Facility, including the responsibility and authority to ensure the Etowah Facility was operated in a reasonable and environmentally-sound manner.

9. Freedom used the Etowah Facility to store and process chemicals and other substances, including a chemical that was used in the coal-mining industry as a cleansing agent and which consisted primarily of the chemical 4-methylcyclohexane methanol. That substance, both in the form as Freedom originally purchased it, and in the form after Freedom processed it, was commonly referred to (and will be referred to hereinafter) as "MCHM."

The MCHM Spill Into the Elk River

10. On the morning of January 9, 2014, it was discovered that MCHM stored at the Etowah Facility had leaked from Tank 396 into a containment area.

11. On that same day, a significant quantity of the leaked MCHM breached containment, ran down the riverbank and discharged into the Elk River via at least two discernible, confined, and discrete channels or fissures. The MCHM then flowed downstream.

The Clean Water Act and the NPDES Program

12. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, codified at Title 33, United States Code, Sections 1251-1387, was enacted by Congress to

restore and maintain the integrity of the Nation's waters and to prevent, reduce, and eliminate water pollution.

13. The Clean Water Act prohibited the discharge of any pollutant into waters of the United States by any person, except in compliance with a permit issued under the National Pollutant Discharge Elimination System ("NPDES") by the United States Environmental Protection Agency ("EPA") or an authorized state.

14. The Clean Water Act contained the following definitions:

- A "person" was an individual or corporation, 33 U.S.C. § 1362(5), and "any responsible corporate officer," 33 U.S.C. § 1319(c)(6);
- The "discharge of a pollutant" was the addition of any pollutant to navigable waters, from any point source, 33 U.S.C. § 1362(12);
- A "point source" was any discernible, confined and discrete conveyance from which pollutants are discharged, for example a pipe, ditch, channel, conduit or discrete fissure, 33 U.S.C. § 1362(14); and
- A "pollutant" was, among other things, solid waste, chemical waste, and industrial waste discharged into water, 33 U.S.C. § 1362(6).

15. At all places relevant to this Second Superseding Indictment, the Elk River was a navigable water of the United States.

16. The EPA delegated the National Pollutant Discharge Elimination System program to the State of West Virginia in May 1982, see 47 Fed. Reg. 22,363 (May 24, 1982). Thereafter, and at all relevant times, the program in West Virginia was administered by the West Virginia Department of Environmental Protection ("DEP"), subject to oversight by the EPA.

17. Pursuant to the delegation of authority, the DEP issued a "Multi-Sector General Water Pollution Control Permit," No. WV0111457 (the "Permit"), under which industrial facilities, such as Freedom, could apply for individual registration and authority to operate. The Permit authorized permit holders to discharge storm water into navigable waters, subject to monitoring and reporting requirements for certain pollutants, but did not allow for the discharge of MCHM.

18. Freedom operated the Etowah Facility pursuant to the Permit, under General Permit Registration Number WVG610920. Freedom did not have any permit allowing for the discharge of MCHM into the Elk River.

NEGLIGENT OPERATION OF THE ETOWAH FACILITY

19. At all times pertinent to this Second Superseding Indictment, Freedom and its officers and agents, including FARRELL and SOUTHERN as responsible corporate officers, failed

to exercise reasonable care to operate the Etowah Facility in a safe and environmentally-sound manner, in that they failed to comply with applicable law, regulations, and guidelines; failed to follow Freedom's own internal operating manual for the Etowah Facility; and failed to conform to common industry standards for safety and environmental compliance. The failure to exercise reasonable care was a proximate cause of the unpermitted discharge of the pollutant MCHM into the Elk River.

20. More specifically and among other things, FARRELL and SOUTHERN failed to ensure:

- The containment area surrounding the tanks at the Etowah Facility was properly inspected and maintained;
- Necessary repairs, including to the dike wall, were made to the containment area at the Etowah Facility, to ensure the containment area would actually contain a chemical spill;
- Tank 396 was properly inspected and maintained;
- Etowah Facility personnel were properly trained on pollution prevention;
- Adequate spill-prevention equipment and supplies were on hand at the Etowah Facility;
- A spill prevention, control and countermeasures ("SPCC") plan was developed and implemented for the Etowah Facility, because Freedom stored mineral oil, fatty acids, and diesel fuel there in sufficient quantities to require an SPCC plan;

- A stormwater pollution prevention plan and a groundwater protection plan were developed and implemented for the Etowah Facility, as required by the NPDES Permit.

CRIMINAL VIOLATION OF THE CLEAN WATER ACT

21. During the time period extending from at least approximately February 2002 through on or about January 9, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants DENNIS P. FARRELL and GARY SOUTHERN acted negligently, that is, they failed to meet a reasonable standard of care as responsible corporate officers for Freedom, by not exercising their authority to ensure that Freedom operated the Etowah Facility in compliance with the Permit, applicable environmental regulations, and in a reasonable and environmentally-sound manner, as detailed above.

22. Their negligence resulted in and proximately caused the discharge of a pollutant, that is, MCHM, from point sources into the Elk River, a navigable water of the United States, from on or about January 9, 2014, through at least January 23, 2014, without a permit issued under Title 33 of the United States Code authorizing such discharge.

In violation of Title 33, United States Code, Sections 1319(c)(1)(A) and 1311.

COUNT TWO
(Unlawful Discharge of Refuse Matter)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 20 of Count One of this Second Superseding Indictment as if fully set forth herein.

2. Beginning no later than January 9, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants DENNIS P. FARRELL and GARY SOUTHERN discharged and deposited, and caused to be discharged and deposited, from the shore, certain refuse matter, that is, MCHM, into the Elk River, a navigable water of the United States, without a permit authorizing such discharge and deposit.

3. The discharge and deposit of MCHM continued through at least January 23, 2014.

In violation of Title 33, United States Code, Sections 407 and 411.

COUNT THREE
(Negligent Violation of Permit Condition)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 9 and 12 through 18 of Count One of this Second Superseding Indictment as if fully set forth herein.

2. During the time period extending from approximately February 2002 until on or about January 9, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants DENNIS P. FARRELL and GARY SOUTHERN, as responsible corporate officers of Freedom, negligently violated a permit condition implementing sections of the Clean Water Act (33 U.S.C. §§ 1311 and 1318), in a permit issued by the State of West Virginia under 33 U.S.C. § 1342, that is, National Pollution Discharge Elimination System Permit No. WV0111457, General Permit Registration Number WVG610920 (the "Permit"), by failing to develop, maintain, and implement a Stormwater Pollution Prevention Plan ("Plan") for the Etowah Facility as required by the Permit and consequently by failing to implement reasonable practices, that is, "Stormwater Management Controls," that would have been required by any such Plan.

In violation of Title 33, United States Code, Sections 1319(c)(1)(A), 1311, and 1318.

COUNTS FOUR - TEN
(Scheme to Defraud in Bankruptcy Case)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 20 of Count One of this Second Superseding Indictment as if fully set forth herein.

2. In approximately the summer and fall of 2013, defendant GARY SOUTHERN, acting in his capacity as Chief Operating Officer of Freedom, negotiated for and executed the purchase and procurement of liability insurance from an agency in Charleston, West Virginia, which insurance provided coverage for Freedom's operations at the Etowah Facility and elsewhere.

3. In approximately the fall of 2013, SOUTHERN acted as the agent of Freedom in the negotiation for and the execution of the sale of Freedom to Chemstream.

4. At all relevant times, SOUTHERN was the investment trustee and sole beneficiary of Southern Investment Trust, which, in turn, was the exclusive owner of an entity known as "Blackwater," through which SOUTHERN was paid by Freedom for his services as Chief Operating Officer of Freedom. SOUTHERN exclusively managed and controlled Blackwater and did not report himself as, and was not in fact, an employee of Blackwater.

Aftermath of the MCHM Discharge: Lawsuits and Bankruptcy

5. A water treatment and distribution plant of the West Virginia American Water Company (the "Water Company"), and an intake for that plant, were located approximately 1 - 1 1/2 miles downstream from the Etowah Facility on the Elk River. Through the intake, the Water Company took in water from the Elk River and treated it to supply water for residents and businesses in Charleston and surrounding areas.

6. The MCHM that discharged into the Elk River from the Etowah Facility flowed into the Water Company's intake and treatment plant on January 9, 2014. As a result, at approximately 6:00 p.m. on January 9, 2014, the State of West Virginia issued a "do not use" advisory, which effectively denied water from the Water Company, for drinking, cooking and washing. The advisory covered an estimated 300,000 residents within a nine-county area for several days.

7. Numerous lawsuits were filed against Freedom as a result of the discharge of MCHM into the Elk River, and the subsequent denial of water from the Water Company for most uses. The first such lawsuit was filed on the morning of January 10, 2014.

8. On January 17, 2014, as a result of the numerous lawsuits against Freedom, and faced with the loss and potential

loss of business and revenue, Freedom sought protection in bankruptcy by filing a voluntary petition for relief under Chapter 11 of Title 11, United States Code, that is, the Bankruptcy Code.

9. SOUTHERN was also sued individually as a result of the MCHM discharge and subsequent denial of water. The first suit against SOUTHERN was filed on January 13, 2014, in the United States District Court in Charleston, West Virginia. (The individuals and entities who sued SOUTHERN will be referred to hereinafter as the "Plaintiffs.")

The Bankruptcy Process

10. The United States Bankruptcy Code exists to assist debtors with getting a fresh start. The bankruptcy laws provide debtors with the opportunity either to reorganize and pay their debts while keeping their property or business, or to liquidate their assets under the bankruptcy court's supervision.

11. A debtor is a person or entity that has filed a petition for relief in bankruptcy.

12. In a bankruptcy case, the debtor must file "schedules" and a statement of financial affairs, to provide information about the debtor's finances, assets, and liabilities. Also, the bankruptcy court typically holds a hearing immediately after the bankruptcy case begins, to review initial motions and questions

about the debtor's organization and finances. That hearing is commonly referred to as the "first-day hearing."

13. A bankruptcy case may involve a large number of creditors, that is, persons and entities who hold or who have asserted a claim against the debtor. The creditors may include those who hold a security interest, such as a lien or mortgage, in some of debtor's property. The creditors also may include those who have claims with no security or priority. The latter are known as "unsecured creditors," and it is common for the bankruptcy court to appoint a committee to represent all unsecured creditors.

14. A bankruptcy case typically involves a hearing known as a "meeting of creditors," at which a debtor or officers of a debtor will testify under oath. Creditors have the opportunity to ask questions about the debtor's assets and liabilities at the meeting of creditors.

Freedom's Bankruptcy Case

15. Freedom filed its bankruptcy petition on January 17, 2014. Freedom's initial intent was to reorganize and then to continue operations as an ongoing business concern. In a bankruptcy hearing on February 21, 2014, however, Freedom indicated its intent to wind up its affairs and no longer attempt to reorganize as a going concern.

16. The first-day hearing in Freedom's case was held on January 21, 2014, in Charleston, West Virginia. The purposes of that first-day hearing included determining who had been responsible for the management, operations and recordkeeping of Freedom in the years and months leading up to the initiation of Freedom's bankruptcy case on January 17, 2014, and establishing a basis for an informed judgment as to who should be entrusted with running Freedom as its bankruptcy case proceeded.

17. As president of Freedom, SOUTHERN testified under oath at the first-day hearing about, among other things, whether he worked for or was otherwise affiliated with Freedom before Chemstream purchased Freedom on December 6, 2013, and whether he was involved with Chemstream's purchase of Freedom.

18. Freedom's bankruptcy case involved a large number of creditors, including unsecured creditors. The creditors of Freedom include some or all of those who had filed a lawsuit against Freedom and also some or all of those who sued SOUTHERN, that is, the Plaintiffs. As of December 8, 2014, over 3000 creditors had filed claims against Freedom, which totaled over \$176 million.

19. Freedom filed a Statement of Financial Affairs on February 17, 2014. In the Statement of Financial Affairs, Freedom listed only three people as former officers and

directors whose relationship with Freedom terminated "within one year immediately preceding the commencement of [Freedom's bankruptcy] case." The three people listed were Farrell, Tis, and Herzing, with 12/6/2013 listed as the date of the termination of their relationship with Freedom as officers or directors.

20. The Bankruptcy Court appointed a Committee of Unsecured Creditors (the "Committee").

21. One of the purposes of the Committee was to ensure that funds were maximized and available for distribution to all unsecured creditors. A critical part of the Committee's purpose included investigating the discharge of the MCHM into the Elk River and determining if there were any legal causes of action that should be pursued on behalf of the unsecured creditors. Such causes of action might include lawsuits against former and current officers, directors, and employees.

22. The meeting of creditors in Freedom's case was held on February 25, 2014, in Charleston, West Virginia. The purposes of the meeting of creditors included reviewing the assets and liabilities of Freedom. It was also a purpose of the meeting of creditors to explore issues that might affect those assets and liabilities, including issues that might help determine whether there were any potential claims that could be brought against

other parties on behalf of the debtor, that is, Freedom, or on behalf of Freedom's creditors.

23. SOUTHERN testified under oath at the meeting of creditors, answering questions about, among other things, his role with Freedom before Chemstream purchased the shares of Freedom on December 6, 2013, including whether he had been a part of Freedom's organization and whether he had played a role in purchasing insurance for Freedom.

The Scheme to Defraud

24. From at least January 21, 2014, through at least December 8, 2014, at or near Charleston, Kanawha County, West Virginia, within the Southern District of West Virginia, and elsewhere, defendant GARY SOUTHERN did knowingly devise and intend to devise a scheme to defraud Freedom's creditors and the Plaintiffs, by misrepresenting and concealing material facts about his role and duties with Freedom before he assumed the duties as president of Freedom in late-December 2013.

The Purposes of the Scheme to Defraud

25. SOUTHERN devised and carried out the scheme to defraud for the purpose of deceiving Freedom's creditors, the Plaintiffs, and other potential claimants who may have been harmed because of the MCHM discharge, into believing that he bore no responsibility for the operations and management of

Freedom and the Etowah Facility before January 2014, and thereby:

- To forestall and defeat lawsuits that had been or might be filed against him;
- To evade claims of Freedom's creditors and the Plaintiffs, and the imposition of legal judgments against him; and
- Ultimately to retain, preserve and protect his substantial assets, which SOUTHERN had estimated in January 2014 to be \$16 million.

Manners and Means for Carrying Out the Scheme to Defraud

26. SOUTHERN intended to accomplish these purposes by, among other things, deceiving creditors of Freedom, the Plaintiffs, the Bankruptcy Court, and government officials, into believing that he was not part of the Freedom organization before the purchase of Freedom by Chemstream and was not responsible for and should not be held legally liable for the MCHM discharge and resulting injuries and damages.

27. In fact, SOUTHERN had worked for Freedom as its Chief Operating Officer beginning in approximately May 2009, and had served on Freedom's board of directors from March 2010 until October 2013. As the Chief Operating Officer, SOUTHERN managed Freedom's business affairs and operations at the Etowah Facility and the Poca Facility, exercised authority in hiring employees and executing contracts, authorized spending, presided over

staff and board meetings, and supervised employees, among other things.

28. It was a part of the scheme to defraud that on January 21, 2014, SOUTHERN falsely and fraudulently testified under oath before the United States Bankruptcy Court at the first-day hearing about his role with Freedom before Chemstream purchased Freedom in December 2013, and his role in the purchase itself.

29. It was further a part of the scheme to defraud that on or about February 7, 2014, SOUTHERN transferred \$6.5 million from his account with Wells Fargo Bank, N.A., by causing a check for \$6.5 million to be deposited in an annuity account with Jackson National Life Insurance Company, at least in part for annuity creditor protection.

30. It was further a part of the scheme that SOUTHERN reviewed the Statement of Financial Affairs and knew it to be false and misleading in that it failed to disclose the extent of his involvement as an officer and director of Freedom before the sale to Chemstream in December 2013. That is, the Statement of Financial Affairs failed to disclose that SOUTHERN had been a director of Freedom from on or about March 17, 2010 through at least October 10, 2013, and that SOUTHERN had been the Chief Operating Officer of Freedom from approximately May 2009 through at least October 10, 2013, and beyond.

31. It was further a part of the scheme to defraud that on or about February 17, 2014, SOUTHERN authorized and approved the filing of that false and misleading Statement of Financial Affairs in Freedom's bankruptcy case, which Statement of Financial Affairs did not list SOUTHERN as having been a former officer and director of Freedom.

32. It was further a part of the scheme to defraud that on February 19, 2014, SOUTHERN made fraudulent representations and omissions to officials with the Occupational Safety and Health Administration about SOUTHERN's role with Freedom before Chemstream purchased Freedom's shares and about his knowledge of the condition of the dike wall enclosing the containment area in the Etowah Facility.

33. It was further a part of the scheme to defraud that on February 25, 2014, SOUTHERN falsely and fraudulently testified under oath at the meeting of creditors about his role with Freedom before Chemstream purchased Freedom's shares in December 2013, including whether he had been a part of Freedom's organization; about the extent of his knowledge of the procurement of liability insurance for Freedom, prior to the sale of Freedom to Chemstream; and whether he was "just an employee" of Blackwater.

34. It was further a part of the scheme to defraud that from February 25, 2014, through approximately December 8, 2014, SOUTHERN never corrected his false and fraudulent testimony and never took any action to amend the false and misleading Statement of Financial Affairs filed in Freedom's bankruptcy case.

Executing the Scheme to Defraud By False and
Fraudulent Representations In Freedom's Bankruptcy Case

35. On or about the dates indicated below, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, and elsewhere, having devised and intending to devise the above-described scheme to defraud, and for the purpose of executing such scheme and attempting to do so, defendant GARY SOUTHERN knowingly made a false and fraudulent representation concerning and in relation to a proceeding under Title 11 of the United States Code, after the filing of the petition, as described below for each count.

<u>Count</u>	<u>Date</u>	<u>False and Fraudulent Representation in Freedom's Bankruptcy Case</u>
4	1/21/2014	At the first-day hearing, SOUTHERN testified that he did not work for Freedom before the purchase of Freedom by Chemstream and had merely been a "part-time, financial type consultant" there.
5	1/21/2014	At the first-day hearing, SOUTHERN testified that he was involved

"superficially" in the purchase of Freedom by Chemstream.

- 6 2/17/2014 SOUTHERN knowingly and willfully caused a false and fraudulent representation to be made in a "Statement of Financial Affairs," which was filed in Freedom's bankruptcy case, in that the statement purported to disclose the names of all persons who had served as officers or directors of Freedom in the twelve months prior to the commencement of Freedom's bankruptcy case.
- 7 2/25/2014 At the meeting of creditors, SOUTHERN testified that he was not "a part of the Freedom organization" before the purchase of Freedom by Chemstream.
- 8 2/25/2014 At the meeting of creditors, SOUTHERN testified that he had been a consultant to Freedom for "sales, marketing, back office" purposes, before the purchase of Freedom by Chemstream.
- 9 2/25/2014 At the meeting of creditors, SOUTHERN testified that he had no knowledge of whether Freedom had engaged a consultant in relation to the purchase of certain insurance policies obtained by Freedom prior to the sale of Freedom to Chemstream and that he could only speak to what was done after that sale.
- 10 2/25/2014 At the meeting of creditors, SOUTHERN testified that he was "just an employee" of Blackwater, the entity through which Freedom paid SOUTHERN for his services as Chief Operating Officer of Freedom.

All in violation of Title 18, United States Code, Section 157(3) and, for Count Six, Title 18, United States Code, Section 2(b).

COUNT ELEVEN
(False Oath and Account in Bankruptcy Case)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 34 of Count Four of this Second Superseding Indictment as if fully set forth herein.

2. On January 21, 2014, in the first-day hearing in Freedom's bankruptcy case, SOUTHERN was questioned about whether he worked for or was otherwise affiliated with Freedom before Chemstream purchased Freedom on December 6, 2013.

3. It was material to the hearing to determine who had been responsible for the management, operations and record-keeping of Freedom Industries in the years and months leading up to Freedom's filing for bankruptcy protection on January 17, 2014. It was further material to the hearing to determine who should be entrusted with running Freedom, managing its day-to-day operations, and preparing and maintaining financial records for Freedom, as its bankruptcy case proceeded.

4. On or about January 21, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, during the first day hearing, defendant GARY SOUTHERN did knowingly and fraudulently make a materially false oath and account, in and in relation to a case under Title 11, United States Code, as follows:

Q [Attorney]: You didn't work for Freedom before the purchase by Chemstream, correct?

A [SOUTHERN]: I did not work for Freedom, no.

* * * * *

Q [The Court]: Before you step down, let me ask -- I understand your testimony to be that you have only recently come to this business, Freedom Industries, as its --

A [SOUTHERN]: President.

Q: -- president. And when did you accept that responsibility? When did you sign on?

A: Well, Freedom didn't exist as an entity as it exists today until the 31st of December.

Q: And that's when you signed on?

A: Yes, sir.

Q: What I don't understand is what capacity, if any, did you have with the companies that were commingled or merged into Freedom?

A: You mean -- at what point?

Q: Well, did you have any capacity prior to December 31st, 2013, with any of the companies?

A: Yes.

Q: You did?

A: Prior to that -- that's a great question. Prior to then, I worked as a part-time, financial type consultant to help the owners of that business get their finances and systems kind of back on track. Which is why I have a relatively detailed knowledge of the business.

Q: The owners of what?

A: The previous owners of Freedom -- the previous owners of Freedom Industries.

Q: You were working with the seller shareholders --

A: I was previously consulting for the seller shareholders in Freedom Industries and Etowah River Terminal, which were two entities.

Q: That was your -- and how many months, if you can estimate, if you recall, were you working in that capacity?

A: Oh, probably three years maybe.

Q: That long?

A: Uh-huh.

5. In fact, the underlined segments of SOUTHERN's material testimony were false, as SOUTHERN then and there well knew. SOUTHERN did work for Freedom, and not as a "part-time, financial-type consultant," before Freedom was purchased by Chemstream on or about December 6, 2013, and before SOUTHERN became Freedom's president in late-December 2013. Beginning in approximately May 2009, SOUTHERN worked for Freedom as its Chief Operating Officer. As the Chief Operating Officer, SOUTHERN managed Freedom's business affairs and operations at the Etowah Facility and the Poca Facility, exercised authority in hiring employees and executing contracts, authorized spending, presided over staff and board meetings, and supervised employees, among

other things. Also, SOUTHERN served on Freedom's board of directors from March 2010 until October 2013.

In violation of Title 18, United States Code, Section 152(2).

COUNT TWELVE
(Scheme to Defraud by Wire)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 34 of Count Four of this Second Superseding Indictment as if fully set forth herein.

Executing the Scheme to Defraud By Interstate Wire

2. On or about January 28, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, and elsewhere, having devised and intending to devise the above-described scheme to defraud, and for the purpose of executing such scheme, defendant GARY SOUTHERN knowingly caused to be transmitted by means of wire communication in interstate commerce, certain writings, signs, and signals, that is, an electronic mail sent to SOUTHERN by his financial advisor, in which the financial advisor provided information, pursuant to prior conversations, about the protection of assets under Florida law from anticipated creditor claims.

In violation of Title 18, United States Code, Section 1343.

COUNT THIRTEEN
(Fraud By Interstate Commercial Carrier)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 34 of Count Four of this Second Superseding Indictment as if fully set forth herein.

Executing the Scheme to Defraud

2. On or about February 7, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, having devised and intending to devise the above-described scheme to defraud, and for the purpose of executing such scheme and attempting so to do, defendant GARY SOUTHERN knowingly deposited and caused to be deposited a matter and thing, that is, an envelope containing his personal check to Jackson National in the amount of \$6.5 million, to be sent and delivered by private and commercial interstate carrier.

In violation of Title 18, United States Code, Section 1341.

COUNT FOURTEEN
(False Oath and Account in Bankruptcy Case)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 34 of Count Four of this Second Superseding Indictment as if fully set forth herein.

2. On February 25, 2014, defendant GARY SOUTHERN testified under oath in the meeting of creditors in Freedom's bankruptcy case.

3. It was material to the meeting of creditors to review Freedom's assets and liabilities. It was further material to explore matters that might affect or relate to the extent and nature of those assets and liabilities, including whether there were any potential claims that could be asserted on behalf of Freedom or Freedom's creditors against those individuals who managed and operated Freedom in the years and months leading up to Freedom's filing for bankruptcy protection on January 17, 2014, and to have full information about the interests and motivations of those individuals, insofar as that information may have affected determinations about the assets available to Freedom's creditors.

4. On or about February 25, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, during the meeting of creditors, defendant

GARY SOUTHERN did knowingly and fraudulently make a materially false oath and account in and in relation to a case under Title 11, United States Code, as follows:

Q [Attorney]: All right. And that purchase of equity interest involved what entities, Mr. Southern?

A [SOUTHERN]: Freedom Industries, Poca Blending and Crete Technologies and Etowah River Company.

Q: And it's my understanding that all those entities, approximately on December 31st of 2013, were merged into our current entity, Freedom Industries?

A: That is correct.

Q: All right. Now -- so I can understand, as a basic outline of the schedules, while these entities were merged, they obviously were separate entities prior to the transaction on December 6th, as I understand it?

A: Uh-huh.

Q: And, in fact, they had different varied responsibilities or activities, would that be fair to say?

A: Yes.

Q: Okay. And what I'm going to try to do is, perhaps, go through each entity. And if you could, give me a basic description of what activities they, in fact, did prior to the acquisition would be helpful.

A: Prior to the acquisition by Chemstream, I was not part of the Freedom organization. I'm happy to speak to what my understanding of the entities are, or [another witness] can speak to it. If you care for me to do it, I'm fine.

5. In fact, the underlined segment of SOUTHERN's material testimony was false, as SOUTHERN then and there well knew. SOUTHERN was "part of the Freedom organization" before Freedom was purchased by Chemstream on or about December 6, 2013. Beginning in approximately May 2009, SOUTHERN worked for Freedom as its Chief Operating Officer. As the Chief Operating Officer, SOUTHERN managed Freedom's business affairs and operations at the Etowah Facility and the Poca Facility, exercised authority in hiring employees and executing contracts, authorized spending, presided over staff and board meetings, and supervised employees, among other things. Also, SOUTHERN served on Freedom's board of directors from March 2010 until October 2013.

In violation of Title 18, United States Code, Section 152(2).

COUNT FIFTEEN
(False Oath and Account in Bankruptcy Case)

1. The Grand Jury re-alleges and incorporates by reference paragraphs 1 through 34 of Count Four of this Second Superseding Indictment as if fully set forth herein.

2. On February 25, 2014, defendant GARY SOUTHERN testified under oath in the meeting of creditors in Freedom's bankruptcy case.

3. It was material to the meeting of creditors to review Freedom's assets and liabilities. It was further material to explore matters that might affect or relate to the extent and nature of those assets and liabilities, including whether there were any potential claims that could be asserted on behalf of Freedom or Freedom's creditors against those individuals who managed and operated Freedom in the years and months leading up to Freedom's filing for bankruptcy protection on January 17, 2014, and to have full information about the interests and motivations of those individuals, insofar as that information may have affected determinations about the assets available to Freedom's creditors.

4. On or about February 25, 2014, at or near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, during the meeting of creditors, defendant

GARY SOUTHERN did knowingly and fraudulently make a materially false oath and account in and in relation to a case under Title 11, United States Code, as follows:

Q [Attorney]: Mr. Southern, you said that you were a consultant through another company for Freedom, since, what, 2009?

A [SOUTHERN]: Approximately, yes.

Q: I had a hard time understanding. What was the name of that company?

A: Blackwater.

Q: And is that a company owned by you?

A: No.

Q: Do you have any -- were you just an employee of that company?

A: Yes.

5. In fact, the underlined segment of SOUTHERN's material testimony was false, as SOUTHERN then and there well knew, SOUTHERN was not "just an employee" of "Blackwater," but was the investment trustee and sole beneficiary of Southern Investment Trust, which, in turn, was the sole owner of the Blackwater entity through which Freedom paid SOUTHERN for his services as Chief Operating Officer of Freedom. In fact, SOUTHERN managed and controlled Blackwater and did not report himself as, and was not in fact, an employee of Blackwater.

In violation of Title 18, United States Code, Section
152(2) .

NOTICE OF FORFEITURE

In accordance with 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Fed R. Crim. P. 32.2(a), and premised upon the conviction of defendant GARY SOUTHERN of one or more violations of 18 U.S.C. §§ 152(2), 1343, and 1341, as set forth in Counts Eleven through Fifteen of this Second Superseding Indictment, the defendant shall forfeit to the United States any property, real or personal, which constitutes or is derived, directly or indirectly, from proceeds traceable to such violation, including, but not limited to, the following:

1. Gary Southern Annuity account xxxxxx8620, Jackson National Life Insurance Company; balance of \$6,483,884.24 as of 9/30/2014;

2. IRA Rollover FBO Gary Southern account xxxxxx200N, US Bank C/F Curian Clearing LLC; balance of \$373,006.65 as of 10/31/2014;

3. IWL Inc. Account xxxxxx900Z, Curian Clearing LLC; balance of \$165,138.85 as of 10/31/2014;

4. Wells Fargo Advisors LLC, Gary Southern account xxxx0529; balance of \$516,208.35 as of 11/30/2014;

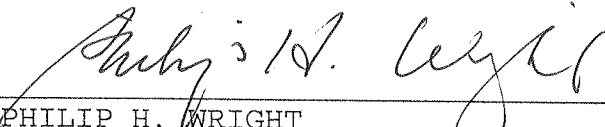
5. Escrow for Chemstream Holdings, Inc./Gary Southern account xxxxxx6663, Somerset Trust Company; amount of \$100,222.49;

6. 2012 Bentley Industries 2-door passenger vehicle, VIN SCBFR7ZA6CC073223; and


7. Real property having a street address of 713 E. Hideaway Circle, Marco Island, Collier County, Florida 34145, being Lot 18, block 17, Hideaway Beach, as recorded in Plat Book 12, pages 80 through 85, Public Records of Collier County, Florida.

UNITED STATES OF AMERICA
R. BOOTH GOODWIN II

By:



PHILIP H. WRIGHT
Assistant United States Attorney



LARRY R. ELLIS
Assistant United States Attorney

ERIC P. BACAJ
Assistant United States Attorney